IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. KENNETH G. HEIRONIMUS, Petitioner.	2 CA-CR 2006-0299-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR98024185

Honorable David M. Roer, Judge

REVIEW GRANTED; RELIEF DENIED

Kenneth G. Heironimus — Kingman
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 A jury found petitioner Kenneth Heironimus guilty of possessing marijuana for sale, manufacturing a dangerous drug, possessing equipment or chemicals for the purpose of manufacturing a dangerous drug, possessing drug paraphernalia, and possessing a dangerous drug. The trial court sentenced Heironimus to a combination of concurrent and consecutive prison terms totaling ten years for the first four offenses and placed him on a concurrent, one-year term of probation for the last offense. Heironimus simultaneously pursued an appeal and a petition for post-conviction relief, filed pursuant to Rule 32, Ariz.

R. Crim. P., 17 A.R.S. In *State v. Heironimus*, No. 2 CA-CR 2000-0419 (memorandum decision filed Oct. 24, 2002), we vacated Heironimus's conviction and sentence for possessing equipment or chemicals for manufacturing a dangerous drug and affirmed the remaining convictions and sentences. In *State v. Heironimus*, No. 2 CA-CR 2002-0236-PR (memorandum decision filed Aug. 27, 2003), we denied relief on Heironimus's petition for review from the trial court's denial of his first post-conviction petition, in which he had raised numerous claims of ineffective assistance of trial counsel.

¶2 Heironimus then filed a second petition for post-conviction relief, which the trial court summarily dismissed. Based on his claim of newly discovered evidence, Heironimus asks that we either vacate his conviction for possession of marijuana for sale or that we order a new trial. We review a trial court's decision to grant or deny post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶3 The trial court found all of Heironimus's claims precluded. Heironimus contends the traffic citations issued to the wife of codefendant Kevin Holbert in 1997 showed that Holbert owned the truck that had been parked on Heironimus's property in which officers had found the marijuana Heironimus was convicted of possessing for sale. Heironimus claims that he did not learn about the citations until June 2004, well after his trial in 2000, and that this information would have convinced the jury that he was not in possession or control of the truck where the marijuana was discovered.

¶4 We note that, in the post-conviction petition, counsel argued that Heironimus's first Rule 32 counsel was ineffective for having failed to raise this claim of

newly discovered evidence. The right to effective assistance of counsel "extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993 (1987). Because there is not a constitutional right to an attorney in state post-conviction proceedings, ineffective assistance of post-conviction counsel is not a cognizable ground for post-conviction relief for defendants who have had the right to appeal. *State v. Mata*, 185 Ariz. 319, 336, 916 P.2d 1035, 1052 (1996). Because his second post-conviction petition is not Heironimus's first appeal, the ineffective assistance claim counsel raised was not cognizable under Rule 32.

¶5 However, Heironimus did not present this claim as one of ineffective assistance of Rule 32 counsel in his supplemental petition, which Heironimus filed with leave of court, or in his petition for review. Because the trial court apparently relied on both counsel's petition and the supplemental petition, we briefly address the newly discovered evidence claim.

¶6 The record does not support Heironimus's claim of newly discovered evidence. To constitute newly discovered evidence justifying relief under Rule 32.1(e), the evidence must have existed at the time of trial but have been discovered after trial; the defendant must have exercised due diligence in discovering the evidence; the evidence must not be simply cumulative or impeaching; the evidence must be relevant; and it must be such that the outcome of the case would likely have been different if the defendant had presented the evidence at trial. *State v. Apelt*, 176 Ariz. 349, 369, 861 P.2d 634, 654 (1993). All the elements must be satisfied to establish a claim of newly discovered evidence. *See State v. Andersen*, 177 Ariz. 381, 387, 868 P.2d 964, 970 (App. 1993).

¶7 Because the traffic citations would have been cumulative evidence only, they are not newly discovered. As Heironimus has acknowledged, he testified at trial that he did not own the truck, and he presented evidence that the fingerprints on the marijuana packages and business flyers found in the truck belonged to Holbert. Thus, evidence that Holbert's wife had received traffic citations related to the truck was, at best, cumulative under Rule 32.1(e)(3). Moreover, Heironimus did not explain how he had exercised due diligence in attempting to discover the citations before trial, as Rule 32.1(e)(2) requires. The mere fact that he did not obtain this information before trial does not show that he exercised due diligence in attempting to do so. The trial court, therefore, did not abuse its discretion by dismissing Heironimus's claim of newly discovered evidence.

¶8 We conclude the trial court correctly denied relief on this claim, but for a reason other than preclusion. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court's ruling if result is legally correct for any reason). Therefore, although we grant the petition for review, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge